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IN THE

Supreme Court of the United States

October Term, 1968-1969

No. 615

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

THE SCHWARZENBACH-HUBER COMPANY,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Textile Workers Union of America, AFL-CIO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on April 24, 1969.

Opinions Below

The opinion of the Court of Appeals is reported at 408 F. 2d 236; 70 LRRM 2805 (2nd Cir., 1969). It is printed in the Appendix, p. 1a. The decision and order of the National Labor Relations Board is reported at 161 NLRB No. 176, dated April 17, 1968 and is printed in the Appendix, p. 75a. The trial examiner's decision is printed in the Appendix, p. 77a.

Jurisdiction

The judgments of the Court of Appeals for the Second Circuit were made and entered on April 24, 1969. The petition of the Textile Workers Union of America, AFL-CIO, for leave to file a petition for rehearing *en banc* was denied on July 23, 1969. On July 18, 1969 Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including September 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and under Section 10(e) and 10(f) of the National Labor Relations Act, 29 U.S.C., Section 160(e), and (f).

Question Presented

Where substantial evidence supports the finding of the National Labor Relations Board: (a) that a majority of the employees in a unit appropriate for collective bargaining signed cards which duly authorize the Union to represent them for collective bargaining purposes; (b) that none of the employees establishing said majority was told that

the cards would be used solely to obtain a Board representation election; and (c) that the Company by other acts and conduct engaged in unfair labor practices designed to dissipate the Union's majority; may the Court of Appeals refuse to enforce a bargaining order based upon such findings, reverse the unfair labor practice findings of the Board and invalidate a large number of properly executed authorization cards thereby determining that the Union did not at any time have a majority?

Statutes Involved

The statutory provisions involved are the following sections of the National Labor Relations Act: Section 7, 29 U.S.C. Section 157; Section 8(a)(1), 29 U.S.C. Section 158(a)(1); Section 8(a)(2), 29 U.S.C. Section 158(a)(2); Section 8(a)(5), 29 U.S.C. Section 158(a)(5); Section 10(e), 29 U.S.C. Section 160(e); Section 10(f), 29 U.S.C. Section 160(f). They are printed in the Appendix, p. 127a.

Statement of the Case

A. The Facts

The case arises out of the Textile Workers Union of America, AFL-CIO's (hereinafter referred to as the "Union" or "TWUA") efforts to organize the employees of The Schwarzenbach-Huber Company (hereinafter referred to as the "Employer" or the "Company") at the Employer's plant in Altoona, Pennsylvania.

In late January 1967[1] the Union commenced an organizing campaign among the Company's employees. On Jan-

1. All dates refer to the year 1967, unless otherwise indicated.

uary 29th a first meeting, attended by some 41 employees, was held by Carl Frazier, the Union representative in charge of the campaign in Altoona. Mr. Frazier explained the goals, aims and purposes of the Union to the employees, opened the meeting for questions, after which employees began signing authorization cards which read as follows:

> "I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said TWUA as my representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." (A 98a).[2]

To insure that there was no confusion as to the import of the employees' act of signing the cards, Frazier "slowly" and "carefully" read the card to the employees (A 104a). Some 35 of the assembled employees signed cards and thereafter both employees and Union representatives solicited cards, so that the Union possessed 99 cards on February 9th, 103 on February 14th, and 122 in the following few weeks (A 96a-97a).

On February 9th the Union sent a letter to the Company claiming to represent a majority of its production and maintenance employees and requesting recognition as collective bargaining agent. After receiving no reply the Union, on February 13th, filed an election petition. On February 14th the Employer, by letter, refused recognition (A 79a). On March 16th an election was conducted in which 106 votes were cast against the Union, 82 votes for the Union and 13 votes were challenged (A 79a).

2. "A" references are to the Appendix.

B. The Employer's Pre-Election Campaign of Coercion

1. The Small-Group Interrogations

Between February 20th and March 10th Brooks Taylor, the Plant Manager, held small group meetings during working hours, attended by 8 to 10 employees. These meetings, attended by nearly all the employees, were conducted in the Company's general office, at a place customarily used for disciplining employees and supervisory conferences and were sometimes also attended by Gerald Eldon, the Company's Vice President, and supervisors Glenn Rabenstein and William Lewis.

During these meetings, which at times lasted some two or three hours, repeated reference, by both Taylor and Eldon, was made to the closing of Altoona Rayon, a plant which permanently closed in 1953 at a time it was under contract to this Union (A 83a). Schwarzenbach-Huber employees were told "it (Altoona Rayon) quit and went south" because "they couldn't compete," the intimation being that the reasons for such failure lay with this Union.

At this meeting various employees were asked why they wanted a union and what did they think a union would do for them. They were told what they had in benefits, that a union couldn't get any more than they already had, and that they didn't need a union, and they were urged to vote against this Union (A 82a-84a).

2. *The Individual Interrogations*

In early March supervisor Merle Grossman started a conversation with employee Judith Massini in which he told her to vote "no", inquiring why she wanted a union, and told her that if the Union got in, the first thing it would do is ask the Company to deduct union dues from paychecks and the Company in return would ask that the Union give up a paid holiday or eliminate a job. Plant Manager Taylor was called over to corroborate these statements and he indicated to Massini that if the Union got in "the slate would be wiped clean" and the Company would negotiate "from scratch with no paid holiday or vacations" (A 86a). The Trial Examiner and the Board credited the testimony of Massini over the qualified denials of Grossman and Taylor (A 91a).

Two days before the election Supervisor Lewis called employee Don Bradley off his job and into his office where Lewis told Bradley that he was concerned about his own job should the plant close or move from town. Lewis then questioned Bradley about the rumor that he was to be the local president and asked him what he thought the Union would do for him. Lewis also asked Bradley whether or not it was true that the Union was advocating bumping[3] in the department and that several bosses were to be replaced. Bradley replied that he knew of no plan to replace bosses nor for plant-wide bumping (A 81a-83a).

Supervisor Rabenstein, too, stressed the issue of his own loss of job and, by implication, mill closing, when a

3. "Bumping" is a term used to describe a seniority system whereby employee Jones, with more plant-wide seniority, laid-off from department "X", can replace or "bump" employee Smith, of department "Y" who may have more seniority in department "Y" but less plant-wide seniority.

day or so before the election he called employee William Wilson into his office for a talk. Rabenstein told Wilson he was concerned for his own job as well as many others should the Union win the election and he was here to protect his job and the jobs of others in the mill (A 86a).

3. Threats of Plant Moving or Closure

As noted above, both supervisors Lewis and Rabenstein, in their conversation with employees, stressed their fears that unionization would mean the possible loss of their jobs, thereby intimating that if the Union were to win the election the plant would close or move.

Meanwhile the Company pelted employees with written messages threatening to close the plant. On March 1st it mailed to every employee a leaflet which portrays a busy open plant with billowing smoke emerging from its chimneys and the legend "We have, here in Altoona, one of the finest textile mills in the world * * * South Carolina not excluded. (Don't let's wreck it now!)"

Below that is a picture of a closed and broken down plant with a few feeble wisps of smoke emerging from its stacks and the legend, "Remember Altoona Rayon" (A 86a-87a). As noted earlier, Altoona Rayon permanently closed its plant in 1953 at a time it was under contract to this Union.

On March 9th a letter from the Company's president Robert Schwarzenbach sent to all employees began with the statement "To say that I am concerned about the future of the mill is putting it mildly." He then reviewed some

of the production problems of the past few years, reminding the employees frequently of the danger that the plant might not survive and concluded by stating:

> "Look at Juniata's 20-year record of around-the-clock employment. And the TWUA? Why isn't there a single major textile operation left in the Northeastern states? Is that the kind of job security the union keeps talking about?
>
> "Why is it that today virtually all our competition is located in the South? Simple enough! The mills down there feel safe from the bickering, discussion and unreasonable demands that come with the TWUA. Remember Altoona Rayon." (A 87a-88a)

A few days prior to the election Schwarzenbach appeared in Altoona and gave a speech to the employees on each shift, making further reference to plant closure or moving. He stated that he could easily sell or lease his plant to a company like Sylvania. He told one shift that if the Union was successful he didn't see how he could stay on but would try to make a go of it. Further reference to the New England plant closure and Altoona Rayon were made to symbolize plant closure due to unionization (A 85a-86a).

On March 20th, a few days after the election, Schwarzenbach sent another letter to the employees, leaving little doubt as to the meaning of his prior statement for in the second paragraph he said:

> "As a group you voted wisely since what actually was at stake was the future of the mill and the long-term security of your job." (A 88a)

4. The Arbitrary No-Solicitation Rule

On February 22nd employee Clyde Brown was called into Plant Manager Taylor's office and given a reprimand and written warning for having discussed the Union with another employee during working time and in the working area.

Prior to this time the Company had no written no-solicitation rule and no method for making the alleged no-solicitation policy known to the employees. The Company had a general policy of permitting all kinds of solicitation in non-working areas and in working areas except when a specific complaint was received about it. In August a solicitation of funds for a sick employee had taken place during working time and in the working areas with a supervisor during the soliciting (A 84a-85a).

C. Post-Election Conduct

On April 18th the Company mailed a notice to the employees announcing the establishment of an Employee Committee which would present employee grievances to the Company. The Company determined the basis of membership on the Committee, chose the membership and determined the length of time each employee member was to serve. The Committee had no constitution or by-laws or officers, held no meetings on its own and no election was ever held to ascertain whether or not the employees wanted the Committee to represent them. No dues were collected and employee members were paid for time spent at meetings called by the Company. The Committee submitted grievances with respect to condolence and bereavement pay,

vacation schedules, employee bulletin boards, new wage scales and additional restrooms (A 91a-94a).

On July 27th the Company sent a notice to its employees indicating that the Committee would no longer exist and had been disbanded (A 95a).

D. Board's Conclusion and Order

The Board concluded that the Company violated Section 8(a)(1) by disciplining employee Brown for his organizing activities; interrogating employees on an individual and group basis; threatening that if the Union were to win, the plant would close or move and jobs would be lost; and threatening the elimination of existing benefits as a condition of bargaining with the Union (A 89a-91a). In addition, the Board found the Company to be in violation of Section 8(a)(2) and (1) by unlawfully dominating, interfering and assisting with the establishment and administration of the Employee Committee (A 94a-95a). Finally, the Board found that the Union represented a majority of the employees in an appropriate unit and that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (A 118a).

The election was set aside and the Company was ordered to cease and desist from the unfair labor practices found and from interfering with the employees' rights guaranteed in Section 7 of the Act and further ordered: to post remedial notices; withdraw recognition from the Employee Committee; expunge the written warning from employee Brown's file; and to bargain collectively with the Union upon its request (A 75a, 120a-121a).

E. The Decision of the Court of Appeals

The Court of Appeals granted the petition to review and granted in part and denied in part the cross-petition of the Board for enforcement of its order (A 2a).

The Court upheld the order setting aside the election and sustained the Board's finding of the Company's violation of Section 8(a)(2) for its conduct in regard to the Employee Committee and Section 8(a)(1) for the Company's reprimand to employee Clyde Brown (A 27a, 40a-41a).

Contrary to the Board and the Trial Examiner the Court did not find the Company in violation of Section 8(a)(1) of the Act for its interrogation of employees Bradley (A 40a) and Massini (A 39a) and the small-group interrogation (A 30a). Nor did the Court find that the Company's threats of moving or plant closure were violative of Section 8(a)(1) (A 38a). Finally, the Court, after invalidating a large number of signed authorization cards, concluded that the Union did not have a majority and therefore the Company did not violate Section 8(a)(1) and (5) when it refused to recognize the Union and, under these circumstances, a bargaining order would not effectuate the purposes of the Act (A 4a).

Reasons for Granting the Writ

A. Conflict With Decisions of the Supreme Court

In this case the Second Circuit rejected the notion, recently adopted by the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc., et al.*, —— U.S. ——, 71 LRRM 2481, that authorization cards may create a duty to bargain

with a union. Their attitude toward authorization cards was succinctly set forth as follows:

> "* * * This 'representation' card business is an abomination. As presently administered it is a pro-Union device that serves no other purpose than to afford a method by which elections can be by-passed and the Unions ushered in without giving the employees individually or collectively any voice in the matter." (A 25a-26a)

This attitude is more readily apparent from the Court's wholesale rejection of authorization cards in this case. Citing with approval the approach of *N.L.R.B.* v. *S. E. Nichols Co.*, 380 F. 2d 438 (2d Cir. 1967) the Court of Appeals rejected the approach of *Cumberland Shoe Corp.*, 144 NLRB 1268, enf. 351 F. 2d 917 (6th Cir. 1965) and *Joy Silk Mills, Inc.* v. *N.L.R.B.* 185 F. 2d 738 (D.C. Cir. 1950) (A 17a-18a) and invalidated the 35 cards signed at the January 29th meeting because the Union representative did discuss the Union's intent to seek an election but "did not tell those present that, even if the Union lost the election, it could demand recognition and the right to bargain upon the basis of the cards" (A 10a). The Court characterized this conduct as "flagrant misrepresentations," "willful omission" and "deceitful," the effect of which was to "perpetuate a fraud" upon the people present. Without any testimony to support its finding, the Court, by inference, drew conclusions as to the impact of these omissions on the thoughts and minds of those card signers (A 10a-11a).

It was this very approach that the Supreme Court in *Gissel* sought to void. Citing *N.L.R.B.* v. *S. E. Nichols Co.*, *supra*, *Gissel* rejected that case's approach toward author-

ization cards and adopted the *Cumberland Shoe-Joy Silk* approach stating:

> "We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry" (71 LRRM at 2493).

and again:

> "In resolving the conflict among the circuits in favor of approving the Board's Cumberland rule, we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorized the union to represent him and then telling him that the card will probably be used just to get an election" (71 LRRM at 2492).

The court of appeals engaged in a lengthy and complicated discussion as to whether the Union had a majority of cards in an appropriate unit of 197 or 199 employees at the time its demand was made on February 9th or at the time the demand was refused on February 14th. The Board, relying on *N.L.R.B.* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684 (2d Cir. 1966) concluded that the Union's demand impliedly continued in force until the Company's reply and the Union therefore had a clear majority in a unit of either 197 or 199. The court of appeals concluded that the cut-off date should be February 9th, that the Union did not have a majority and, therefore, a bargaining order was not appropriate. *Gissel,* however, sustains holdings

which state that the Board may issue a bargaining order where the Union at any point had a majority and, under some circumstances, may issue such an order in the absence of a Section 8(a)(5) violation. Thus, the question as to when the Union obtained its majority is irrelevant.

Gissel, in discussing the Fourth Circuit's refusal to validate a bargaining order based upon authorization cards, indicated that the Circuit "left open the possibility of imposing a bargaining order, without need of inquiring into majority status" * * * "in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices" and stated for a long time the Board has issued bargaining orders, absent a Section 8(a)(5) violation or demand, where the unfair labor practices made it the only available remedy. Stating approval for the use by the Board of a bargaining order in "less extraordinary cases" this Court said:

> "The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should re-emphasize, where there is also a showing that *at one point the union had a majority;* * * *" (71 LRRM at 2495, emphasis ours).

Directly on point, this Court held in *Gissel,* that the threats of plant closure in *Sinclair Co.* v. *N.L.R.B.* Case No. 585, which were similar in nature to the threats made in the instant case, were by their nature "so coercive that, even in the absence of an Section 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats" (71 LRRM at 2496).

In light of *Gissel,* this court of appeal's decision is improper for the very nature of the unfair labor practices

requires that a bargaining order issue even in the absence of a Section 8(a)(5) violation. Moreover, had the court of appeals not improperly invalidated 35 authorization cards (improper in light of this Court's holding in *Gissel*, discussed in detail in Section "A" of this writ) the Union would have 122 valid cards, an overwhelming majority of a unit of 197 or 199 employees, and the bargaining order issued by the Board is a proper remedy under the holding in *Gissel*, which, as previously noted, states that the Board has the authority to issue bargaining orders where it can be shown that at one point the Union had a majority.

B. Non-Compliance of the Court With the Supreme Court's "Substantial Evidence" Doctrine

In *N.L.R.B.* v. *Gissel, supra,* this Court reiterated the holding of *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404 and *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, in noting the Circuit's failure to apply the "substantial evidence" rule to cases decided by the Board. In *Gissel* this Court said:

> "It is true that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship" (71 LRRM at 2498).

and again in discussing an appropriate remedy:

> "It is for the Board and not the courts, however, to make that determination based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity" (71 LRRM at 2494, footnote 32).

In the instant case the Second Circuit has exceeded its scope of review in the manner condemned by this Court.

In this case there was substantial evidence to support the Board's finding that the threats of plant closure and moving were coercive and in violation of Section 8(a)(1). The Trial Examiner and the Board based their decision upon the manner in which the threats were made, by whom, their timing, their frequent reference to other plant closing in the area and the constant talk about loss of jobs should the Union win. Stating that it could "find absolutely nothing to indicate antagonism or hostility toward this Union or any Union" (A37a) in such conduct, the court of appeals reversed the finding of a Section 8(a)(1) violation by the Board. Such conduct not only ignores this Court's direction in *Universal Camera, supra,* but is contrary to the holding in *Gissel* that:

> "Conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof" (71 LRRM at 2497).

and that:

> "If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable predication based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment" (71 LRRM at 2497).

The Second Circuit's mistaken interpretation of its reviewing function can be found throughout its opinion. Of the interrogation of employee Massini by Supervisors Taylor and Grossman during which Massini was told the

Union would have to bargain from scratch and which the Board, crediting Massini testimony, found a Section 8(a)(1) violation, the court of appeals said "Nevertheless it seems highly improbable that Taylor would make such a statement" (A 39a). Of the incident between employee Bradley and Supervisor Lewis during the course of which Lewis indicated he feared the loss of his job and that of others if the Union were to win, and which the Board found objectionable and in violation of Section 8(a)(1), the court of appeals characterized these statements as "idle rumors" which had been "inflated into an unfair labor practice" (A 40a). Of the small-group interrogations which were found by the Board to be held in an improper atmosphere, coercive in nature and in violation of Section 8(a)(1), the Court found them to be mere "dialogues rather than interrogation" (A 28a).

In determining the Company's motivation for its conduct from the above, the facts, at best, give rise to more than one view. Where there is a difference between the Board's view and the Court's, the Court may not substitute its view nor "displace the Board's choice" between the two views where the Board's decision is supported by substantial evidence. *Universal Camera, supra.* This is true even where the Court could have justifiably drawn a different conclusion had it heard the case *de novo.*

Either through an inadvertence or because it was thought unnecessary because of the Union's over-all majority, the exact size of the unit on February 9th was never resolved by the Trial Examiner nor the Board. At issue was the eligibility status of employees Krise and Becker—

a question which should rest solely with the Board because of its expertise in this area. Yet, the court of appeals, again over-stepping its reviewing function, substituted its expertise for that of the Board and concluded that both employees were eligible. Such a decision is clearly beyond the bounds of review set forth by this Court in *Gissel, Walton* and *Universal Camera, supra.*

The Board sustained numerous findings of credibility made by the Trial Examiner in determining the validity of the Section 8(a)(1), (2) and (5) charges, exercising its particular expertise in the area of employer-employee conduct. In accordance with the scope of review delineated by *Universal Camera* and reiterated by this Court in *Walton* and *Gissel* such finding, when as here, supported by substantial evidence, should not have been disturbed on review.

Conclusion

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: September 10, 1969

Addendum

Due to the length of the lower court opinions, the Appendix, consisting of the Court of Appeals' Decision (A 1a), the Board's Decision and Order (A 75a), the Trial Examiner's Decision (A 77a), and the Statutes involved (A 127a), has been reproduced in a separate volume.